April 1. 79. Atty's. of N. H. Jersey

80 No 1379
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 196.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JAMES H. GRANT.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 7, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 196.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES H. GRANT.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between James H. Grant, plaintiff, and the Baltimore and Potomac Railroad Company is defendant, No. 10361 at law, a manifest error hath happened to the great damage of the said defendant, as by its complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 6th day of December, in the year of our Lord 1875, and of the Independence of the United States the 100th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To James H. Grant:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein the Baltimore and Potomac Railroad Company is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Ch'f Just.

Service acknowledged.
Dec. 7, 1875.

W'M F. MATTINGLY,
Att'y for Grant.

(Indorsed:) 10361 at law. James H. Grant vs. The Baltimore & Potomac Railroad Company. Filed Dec. 7, 1875. R. J. Meigs, clerk.

2 In the supreme court of the District of Columbia, the 9th day of December, 1876.

JAMES H. GRANT
vs.
BALTO. AND POTOMAC RAILROAD CO. } At law. No. 10361. In error.

Know all men by these presents that we, the Baltimore & Potomac

Railroad Company, and Lewis McKenzie and O. A. Stevens, of Washington City, District of Columbia, are bound unto the above-named James H. Grant in the sum of three thousand dollars lawful money of the United States, to be paid to the said James H. Grant, his executors or administrators. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents Sealed with our seals and dated this 9th day of December, 1875.

Whereas the above-named Baltimore and Potomac Railroad Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Baltimore and Potomac Railroad Company shall prosecute its said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL OF R. R. CO.] ODEN BOWIE,
President Balto. & Potomac Railroad Company.
LEWIS McKENZIE. [SEAL.]
O. A. STEVENS. [SEAL.]

Sealed and delivered in presence of—
Attest:
J. CROWE, *Secretary.*
J. K. SHARP.

The foregoing bond is approved this 18th day of Dec., A. D. 1875.
D. K. CARTTER,
Chief Justice.

3 In the supreme court of the District of Columbia.

DISTRICT OF COLUMBIA, *to wit:*

JAMES H. GRANT, PLAINTIFF,
vs.
THE BALTIMORE AND POTOMAC RAILROAD Company, defendant. } No. . At law.

Declaration.—Filed 6th January, 1873.

The plaintiff sues the defendant, a foreign corporation doing business in the District of Columbia, for that, whereas, the defendant, to wit, on the 13th day of September, A. D. 1872, at the District aforesaid, was possessed of certain railroad and steam-engine and cars, used in running on the same for the transportation of freight.

And certain servants of said defendant had the management, care, and direction of one of said freight trains of said defendant and
4, 5 the steam-engine drawing the same, to wit, at the District aforesaid; yet said defendant, not minding or regarding its duty in this behalf, took so little and so bad care of the said train and engine, that by and through the negligence, carlessness, and mismanagement of the said defendant and its said servants, and for want of due and proper care of the said defendant and its said servants, that two of said cars belonging to said train were with great violence driven against and upon the said plaintiff, as he, the said plaintiff, was then in and crossing over a cer-

tain street and common highway, to wit, at the District aforesaid, whereby the said plaintiff's foot was cut, lacerated, and mashed; and the said plaintiff thereby became and was lamed and crippled, sick and disordered for a long space of time, to wit, from thence hitherto, during which time the plaintiff suffered and underwent great pain and became permanently injured to the damage of the plaintiff in the sum of fifteen thousand dollars; and therefore he brings suit.

6 R. T. MERRICK,
W. T. MATTINGLY,
Att'ys for Pl'ff.

The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof, otherwise judgment.

R. T. MERRICK,
W. T. MATTINGLY,
For Pl'ff.

Summons.—Issued 6th of January, 1873.

In the supreme court of the District of Columbia, the 6th day of January, 1873.

JAMES H. GRANT, PLAINTIFF,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY, defendant. } At law. No. 10361.

7 The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

[SEAL OF COURT.] R. J. MEIGS, *Clerk.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except May, in which month they commence on the third Monday; and August, in which month there is no term of the court.

On back.

8 Served copies of the declaration, notice to plead, and this summons on the defendant, Edward Dubarry, agent, the 8th day of January, 1873.

A. SHARP,
Marshal.

Plea.—Filed 1st February, 1873.

In the supreme court of the District of Columbia.

JAMES H. GRANT
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY. } At law. No. 10361.

And the said defendant, by Daniel Clarke, its attorney, comes and de-

fends the wrong and injury, when, &c., and says that it is not guilty of the said supposed wrong and injuries above laid to its charge, or any part thereof, in manner and form as the said plaintiff has above thereof complained against it. And of this the said defendant puts itself upon the country, &c.

9 DANIEL CLARKE,
Att'y for Def't.

Joinder in issue.—Filed Jan. 20th, 1874.

In the supreme court of the District of Columbia.

GRANT
vs.
BALT. & POT. R. R. C. } No. 10361.

The plaintiff joins issue on defendant's plea.

MATTINGLY,
For Pl'ff.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said district, commencing the fourth Monday, 25th day of January, 1875:

10 MONDAY, *January* 25, 1875.

By order of Chief Justice Cartter, one of the justices of said supreme court presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

MONDAY, *March* 22, 1875.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

JAMES H. GRANT, PL'FF,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY, def't. } At law. No. 10361. Cal. 122.

Now come here as well the plaintiff by his attorneys, Mess'rs Merrick & Mattingly, as the defendant, by its attorneys, Mess'rs Garnett & Clark, and a jury of good and lawful men of this District, to wit: Eslin D. Reed, Benjamin Summy, Charles W. King, William R. Fowler, Patrick Clark, Edward Gorman, William S. Horton, Peter Vessels, William C. Harper, Andrew T. McCormick, James S. Schagg, and Samuel

11 Ceas, who, being duly sworn and affirmed to well and truly try the issue above joined, after the case is given them in charge, on their oath say they find the issue aforesaid in favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises is the sum of twenty-two hundred and fifty dollars, besides costs.

And thereupon the defendant, by its said attorneys, gives notice of a motion for a new trial on exceptions.

SATURDAY, *April* 24, 1875.

Session resumed pursuant to adjournment, Cartter, chief justice, presiding.

JAMES H. GRANT, PL'FF,
vs.
THE BALTIMORE & POTOMAC R. R. CO., DEF'T. } At law. No. 10361.

Now, again comes here the defendant, by its said attorneys, and ten-

ders to the court here its bill of exception to the rulings of the
11½ court on the trial of this case, and prays that they may be duly signed, sealed, and made a part of the record, now for them, which is done accordingly.

12 In the supreme court of the District of Columbia.

JAMES H. GRANT
vs.
BALTIMORE AND POTOMAC RAILROAD COMPANY. } At law. No.

Bill of exceptions.—Filed April 24th, 1875.

Upon the trial of this cause, the plaintiff to maintain the issue on his part joined, offered evidence tending to prove that he was a journeyman carpenter by trade; that he resided on D street, between 9th and 10th streets, southwest, in this city; that on the morning of the 13th of September, 1872, he started from his house at 6.20 o'clock a. m., to go to his work in the northern part of the city; that from his door he saw defendant's train of freight-cars lying along Maryland avenue; that his route was by way of 9th street; that on crossing up 9th street
13 the train extended from between 7th and 8th streets nearly to 10th street; that it was standing still with an engine attached, at the west end of the train; that at the crossing on 9th street he attempted to pass over said train between two of the cars, when the train, without any signal or warning of any kind, suddenly shoved back, throwing him so that his foot was caught between the bull-noses of the couplings of the cars, and was badly mashed, rendering amputation of two of his toes necessary; that he was confined to his house under medical attendance for several months; that since the accident he has been unable to pursue his oc'upation as he had done previously, and would in the future be unable so to pursue his said trade; that this train remained across said 9th street for about 20 minutes after he had been injured; that Maryland avenue had been dug up by the board of public works, and left in that condition; that it had rained the night before,
14 and was impassible except at those streets where there were crossings, on account of the mud; that there was crossings at 9th and 7th streets, but none at 8th street; that to have gone around said train he would have gone down to 7th street, a distance of two squares out of his way, unless he crossed in the mud.

The plaintiff then offered evidence tending to prove that long prior to the time of said accident the defendant, with the knowledge of the plaintiff, had been constantly in the habit of obstructing said 9th street with their trains, with the engines attached, for as long as a half hour at a time, and that persons having occasion to cross said avenue at said 9th street had theretofore been in the constant habit of passing under and over defendant's cars in the presence of defendant's employees in charge of the trains, with their knowledge and without their protest, to the admissibility of which evidence the defendant objected as irrelevent;
15 but the court admitted the same, stating that while the action of the company in obstructing the streets does not constitute the predicate of an unjustificable venture on the part of the plaintiff, yet it forms a part of the case. Whereupon the defendant, by its counsel, excepted to the ruling of the court, admitting said evidence, and prays the court to sign, seal, and enroll the defendant's first bill of exceptions,

which is accordingly done this 19th day of March, A. D. 1875, now for them.

[SEAL.] D. K. CARTTER,
Chief Justice.

The plaintiff offered in evidence the act of the legislative assembly of the District of Columbia, approved , and the plaintiff rested.

And the counsel for the defendant, to maintain and prove on their part the issues above joined, gave in evidence to the jury tending to
16 show that at the time the plaintiff got upon the freight-train of the defendant the said train was moving slowly forward, and had just reached and partly passed the intersections of Maryland avenue and Ninth street, thus forming a continuous train on Maryland avenue, and that said train was in process of stopping and did stop almost instantaneously with the plaintiff's getting upon it, by the engineer's shutting off steam and by the brakesman's putting down the brake on the end of the last car; and that said train was upon an up-grade; and that upon said stoppage by the action of the law of gravitation the bull-noses of all the cars were brought together, and the injury was thus inflicted upon the plaintiff; and further, that the foot of the plaintiff could not have gotten between the bull-noses of the cars if the plaintiff had gotten upon the train of defendant after it had stopped, for
17 the reason that the bull-noses were brought closely together upon the stoppage of the train, and so remained until the train again started forward, although, in the opinion of one of the witnesses produced on the part of the defendant, the bull-noses would not instantly close together, but the engine would hold the train for a time, until the power was spent in the steam chest and the force of gravitation overcame the propelling force in the steam-chest remaining after the steam was shut off; and further, the acts of Congress approved February 5th, 1867, chapter 29, vol. 14, page 387, and the act approved March 18th, 1869, vol. 16, page 1 of the statutes, and the act approved June 21st, 1870, vol. 16, page 161, Statutes at Large, and also the ordinance of the corporation of Washington as contained in the 6th section, dated May 24th, 1866, an act of legislative assembly, August 23rd, 1871, page 107, 1st session, to show that the defendant had the right to use the depot situated on the corner of Maryland avenue and Ninth street, and
18 the right to use Maryland avenue, and in the exercise of the right to stop its trains for a reasonable time at said depot in the usual pursuit of its business, and that on the morning when the accident occurred it was in the usual pursuit of its business, and had not delayed the public unreasonably or unnecessarily.

And further, that the defendant, prior to the time of this accident, by its printed orders and rules issued to the conductors in charge of its freight-trains, required the crossings on the public highway should not be obstructed unreasonably and also that the superintendent of the defendant's road, Edward L. Dubarry, and the general agent in charge of the freight department, O. A. Stevens, gave similar verbal orders to the employees in charge of its freight-trains, and that the employees of defendant had obeyed said orders, and that the longest period of time for which the crossings on Maryland avenue had been obstructed by the trains of the defendant was between five and six minutes, unless
19 the obstruction was continued on account of some accident to defendant's train which prevented its being moved without delay; and that the superintendent of the defendant's road, Edward L. Dubarry, had requested the police to inform him of any unreasonable obstruction of the crossings upon Maryland avenue by the trains of the defendant.

And further, that the superintendent of defendant, Edward L. Dubarry, and the general agent in charge of its freight department, O. A. Stevens, prior to the time of the accident, had directed the conductors and employees in charge of its freight-trains, not to allow persons to pass across its trains while the same were in motion, or while an engine was attached thereto, and that said sup't, Edward L. Dubarry, and general agent, O. A. Stevens, had personally, upon various occasions, warned persons against and prevented them from passing over or under the trains of defendant while in motion, or with an engine attached; and that Carroll, the conductor of the train which inflicted the injuries upon plaintiff, had upon several occasions warned persons against getting upon the trains under his charge while in motion and before they stopped, and also against crossing them while still but with an engine attached; and further proved that the employee Simmons was not in charge of the trains of the defendant, but was an employee in the freight-office, attending to the receiving and delivery of freights that after the train came to a stop, subsequently to the plaintiff getting on the same and prior to his receiving the injury, the engineer did not reverse his engine or do anything to give the said engine either a forward or backward movement, and that as soon as the plaintiff's foot was caught between the bull-noses a signal was given to the engineer to move forward so as to open the bull-noses and extricate the plaintiff's foot, and that he did so immediately upon getting the signal.

And here the defendant rested.

And the evidence being closed, the counsel for the defendant moved the court to strike out and exclude as not admissible on the issue above joined in this cause all the testimony given on the trial both by the plaintiff and defendant in relation to the habit of the defendant as regards obstructing by its trains the crossings on Maryland avenue, and the habit of other persons in passing over or under the trains when so obstructing the crossings; and to instruct the jury that, in making up their verdict, they should not consider said testimony, but confine themselves to the evidence of what occurred on the morning of the accident before and up to the time that the injury was received by plaintiff; but the justice overruled the motion made by the counsel for defendant, and ruled that the evidence referred to in said motion was good and admissible, and left the consideration thereof to the jury.

Whereupon the counsel for the defendant excepted to the refusal of the judge to strike out and exclude the said evidence from the jury and to the said opinion of the justice before the giving of the verdict, and the said counsel requests said justice to sign, seal, and enroll this the defendant's second bill of exceptions, which is accordingly done now for them this 19th day of March, 1875.

[SEAL.] D. K. CARTTER,
Chief Justice.

After the evidence set forth in the defendant's first and second bills of exceptions, which by agreement is made a part of this exception, had been offered, the court at the request of the plaintiff's counsel instructed the jury:

"If the jury find from the testimony that the train of the defendant was lying across Ninth street on the morning of the accident, obstructing travel along Ninth street; that the plaintiff got on the train when it was standing still; that the injury to the plaintiff was occasioned by suddenly starting the train either backward or forward; that there was

no notice given of the movement of the train either by ringing a
23 bell, blowing a whistle, or otherwise, and that theretofore the defendants had been in the habit of obstructing Ninth street; that footmen had theretofore been in the habit of passing under and over the cars in the presence of the employees of the defendant having charge of the train, with their acquiescence and without their protest; if you find these conclusions concurring, the defendant is liable; these facts concurring makes it the duty of the defendant to give notice of some kind before moving."

To the granting of the above instruction given by the court the defendant by his counsel excepts; and prays the court to sign, seal, and enroll this its third bill of exceptions, which is accordingly done now for them this 19th day of March, 1875.

[SEAL.] D. K. CARTTER,
Chief Justice.

24 Proceedings before the supreme court of the District of Columbia, sitting in general term, commencing on the fourth Monday, 27th day of September, 1875.

MONDAY, *September* 27, 1875.

Session commenced; present, Chief Justice Cartter and Justices Olin, Wylie, and MacArthur; absent, Justice Humphreys.

MONDAY, *November* 29, 1875.

Session resumed pursuant to adjournment; present, Justices Olin, Wylie, Humphreys, and MacArthur. Chief Justice Cartter absent, holding the circuit court.

JAMES H. GRANT, PL'FF,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY, def't. } At law. No. 10361.

And now again come here as well the plaintiff as the defendant,
25 by their respective attorneys, and thereupon, because it seems to the court here that there is no error in the record and proceedings of the circuit court, it is considered that the defendant's aforesaid motion for a new trial upon exceptions be, and the same is hereby, overruled, and that the plaintiff recover against the defendant two thousand two hundred and fifty dollars, in manner and form aforesaid found, payable by the defendant to the plaintiff by reason of the premises, with interest thereon from the date of the verdict, March 22, 1875, and $67.05 costs of suit, and have execution thereof.

26 CLERK'S OFFICE,
Supreme Court of the District of Columbia, ss:

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this case.

Witness my hand and the seal of said court this 25th day of September, A. D. 1876.

[SEAL.] R. J. MEIGS, *Clerk.*

(Indorsement on cover:) No. 196. The Baltimore & Potomac Railroad Company, plaintiff in error, vs. James H. Grant. Dist. of Columbia sup. c't. Filed 7th October, 1876.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 196—October Term, 1878.

THE BALTIMORE AND POTOMAC R. R. CO., PLAINTIFF IN ERROR,

vs.

JAMES H. GRANT.

After the evidence set forth in the defendant's first and second bills of exception, which by agreement is made a part of this exception, had been offered—

The following prayers were submitted on the part of the defendant:

1. That if the jury shall find from the evidence that the injury complained of would not have occurred if the plaintiff in crossing Maryland avenue had not attempted to get upon the freight-train of the defendant, at the time in motion, at the intersection of Maryland avenue and 9th street, and that he could have crossed Maryland avenue in safety by walking less than a square, and passing around the train
2 of which said cars formed a part, then he is not entitled to recover in this case.

2. If the jury believe from the evidence that at the time the plaintiff got upon the freight-train of the defendant the said train was moving forward, and had reached and partly passed the intersection of Maryland avenue and 9th street, thus forming a continuous train on Maryland avenue across the intersection of Maryland avenue and 9th street, and that said train was stopped; and that in consequence of said stoppage the bull-noses of the two freight-cars, between which the foot of the plaintiff was placed, were brought violently together, thus crushing the foot of the plaintiff, then the act of the plaintiff in getting upon said train, was such a want of ordinary care as contributed directly to the injury, and he cannot recover.

3. If the jury shall find that the plaintiff did not exercise proper care and prudence in crossing Maryland avenue, at its intersection with 9th street, by attempting to pass across the train of the defendant, and that the injury occurred in consequence of his want of proper care and prudence on his part, then the plaintiff is not entitled to recover, although the jury may further find that at the time the plaintiff attempted
3 to pass across the said train of the defendant the train was temporarily blocking the crossing at the intersection of Maryland avenue and 9th street.

4. That the proper care which the plaintiff was bound to use in crossing Maryland avenue, at its intersection with 9th street, was such care as a man of ordinary prudence and discretion ought to use in the circumstances in which he was placed, and not such care as a man of ordinary prudence and discretion might sometimes use under like circumstances to avoid obstructions in the highway; and if the jury find that the plaintiff attempted to cross over the train of the defendant between two freight-cars while the train was in motion, and before the train had come to a full stop, this was not the exercise of proper care on the part of the

plaintiff, and he cannot recover for any injury received by him while so attempting to cross over the train.

5. The defendant, under the act of Congress approved February 5th, 1867, and the several supplements thereto, and in the use of the freight depot which the Washington, Alexandria and Georgetown Railroad Company was authorized to erect on Maryland avenue between
4 7th and 10th streets, had a right to use the track where it crosses Maryland avenue, at the intersection of 9th street, to shift its cars in the usual pursuit of its business, provided it was done in a reasonable manner and it did not delay the public travel for any unreasonable length of time, and if the jury shall find that on the morning when the accident occurred it was in the usual pursuit of its business, and had not delayed the plaintiff or the public unreasonably or unnecessarily, at the time the accident occurred, then the obstruction of the said crossing by the defendant at the time the accident occurred to the plaintiff was not unlawful.

6. If the jury shall find from the evidence in the cause that the defendant, prior to September 13th, 1872, by its printed orders and rules issued to its conductors in charge of freight trains, required that the public highway should not be obstructed unreasonably or unnecessarily, and also that the superintendent of the defendant's road, Edmund L. Dubarry, and the general agent in charge of the freight department, Stevens, gave similar orders to the agents or employees in charge of its freight trains, and that the said superintendent and general
5 agent also directed the conductors and employees in charge of its freight trains not to allow persons to pass across its trains while the same were in motion, or while engines were attached to the same, and that persons were warned not to pass across the said trains while in motion, or while an engine was attached thereto, and that notwithstanding said orders some persons passed across the said trains prior to September 13th, 1872, while the same were blocking the crossing at the intersection of Maryland avenue and Ninth street, and that other persons passed across said trains and were not stopped or prevented from crossing by an employee, Simmons, and other inferior employees of the defendant not in charge of the trains, then such passing of persons across the said trains on other occasions and such failure on the part of the said employees not in charge of the train to prevent or for'warn the said persons from crossing the said trains did not constitute or amount to a license or authority from the defendant to the public to use the trains of the defendant, when in motion or when an engine was
6 attached thereto, as a part of the public highway for passing and repassing over the same, nor did it impose upon the defendant the duty and obligation of securing to the public a safe passage across its trains as a part of the public highway; and the jury, if they find the aforegoing facts, cannot consider the same for the purpose of relieving the plaintiff from the obligation to use ordinary care in crossing the said avenue at Ninth street at the time when the accident occurred.

7. If the jury shall find from the evidence that it was dangerous for the plaintiff to cross the train of the defendant while an engine was attached to the same, and that in attempting to cross the said train he did not exercise ordinary care and prudence, then the fact that other persons had crossed the trains of the defendant, while an engine was attached to the same, prior to September 13th, 1872, and had not been stopped by the employees of the defendant (if they shall so find), did not relieve the plaintiff from the obligation to exercise ordinary care and prudence in crossing said avenue, or impose upon the defendant or its

agents the duty and obligation of exercising more than ordinary
7 care and prudence in the management of the train at the time the plaintiff was crossing the said avenue and he received his injury.

8. If the jury find from the evidence in the cause that the plaintiff jumped on the train of the defendant after the same had stopped upon an ascending grade and before the bull-noses of the cars, between which the plaintiff passed, had come together, and that while the plaintiff was attempting to cross the train the bull-noses came together and caught the foot of the plaintiff without the engine either being cut loose from the train or being reversed after the train stopped, but by reason of the force of steam in the steam-chest being spent, and the action of the law of gravitation upon the train, then the jury must find that the injury to the plaintiff did not result from the want of proper care of the defendant in the management of the train, and the plaintiff is not entitled to recover.

9. If the jury shall find that after the plaintiff jumped on the freight-
train of the defendant, defendant or its agents could not have
8 prevented the injury to the plaintiff by the exercise of proper and ordinary care in the management of the train, then the plaintiff is not entitled to recover.

Which prayers were allowed by the court.

The court then, at the request of the plaintiff's counsel, instructed the jury as follows:

"If the jury find from the testimony that the train of the defendant was lying across Ninth street; that the plaintiff got on the train when it was standing still; that the injury to the plaintiff was occasioned by suddenly starting the train either backward or forward; that there was no notice given of the movement of the train, either by ringing a bell, blowing a whistle, or otherwise, and that theretofore the defendant had been in the habit of obstructing Ninth street; that footmen had theretofore been in the habit of passing under and over the cars in the presence of the employees of the defendant having charge of the train, with their acquiescence, and without their protest—if you find these conclusions concurring, the defendant is liable; these facts concurring make it the
9 duty of the defendant to give notice of some kind before moving."

To the granting of the above instruction given by the court on behalf of the plaintiff, the defendant, by its counsel, excepts, and prays the court to sign, seal, and enrol this its third bill of exceptions, which is accordingly done now for them this 19th day of March, 1875.

D. K. CARTTER, [SEAL.]
Chief Justice.

It is hereby stipulated and agreed that the foregoing comprises the defendant's 3rd bill of exceptions, as taken, made out, and signed and sealed by the court, in the court below, and that the same shall be considered and held as such 3rd bill of exceptions, and part of the record in this cause in this court.

ENOCH TOTTEN,
Att'y for Pl'tf in Error.
R. T. MERRICK,
Att'y for Def't in Error.

IN THE

Supreme Court of the United States.

No. 196.—October Term, 1878.

THE BALTIMORE & POTOMAC RAILROAD COMPANY, Plaintiff in Error,

vs.

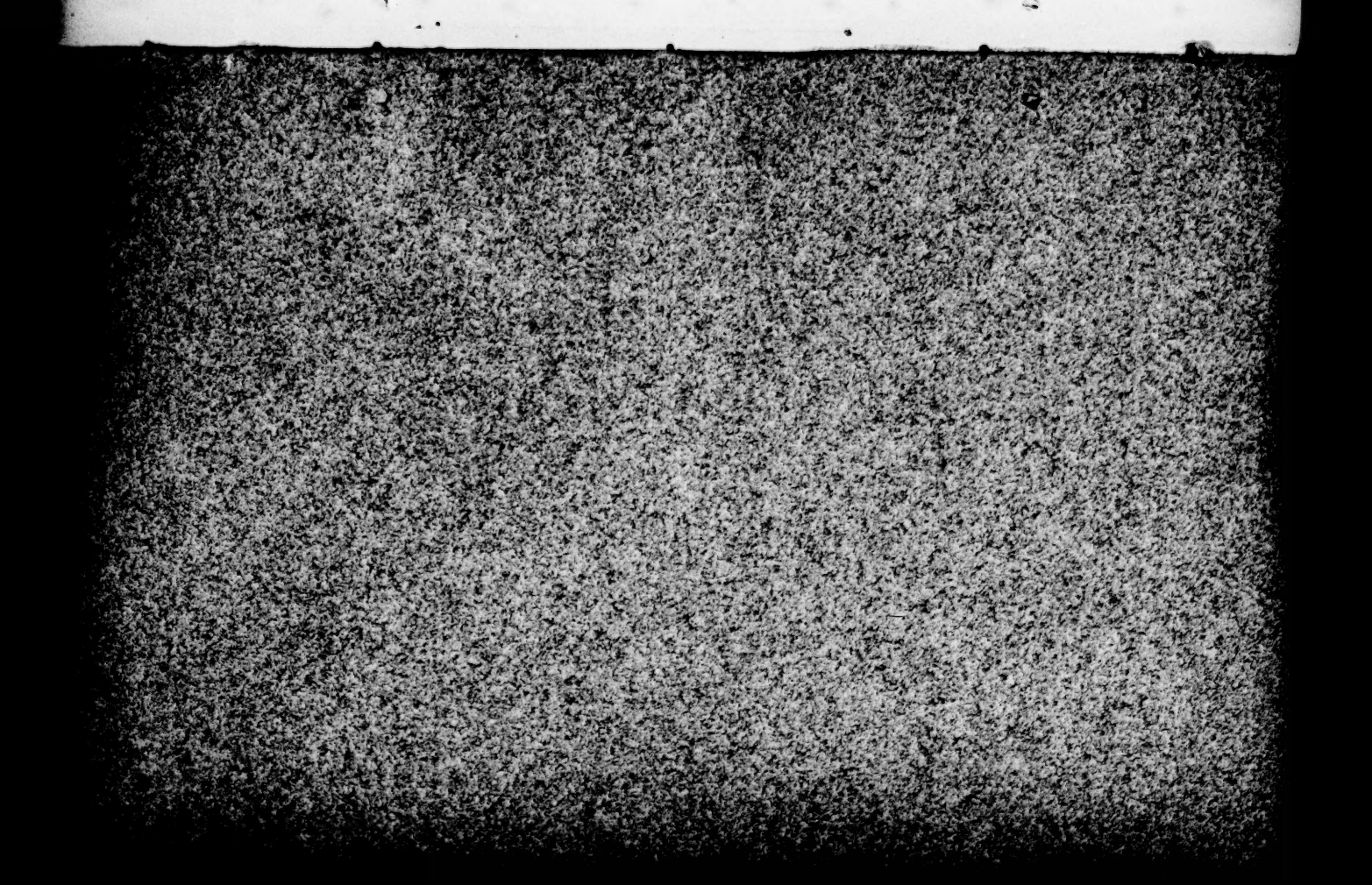
JAMES H. GRANT, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ENOCH TOTTEN,

Counsel for Plaintiff in Error.

Joseph L. Pearson, Printer, 9th and D streets, Washington.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1878.

THE BALTIMORE & POTOMAC RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES H. GRANT, Defendant in Error.

No. 196.

STATEMENT OF THE CASE.

This is a writ of error to the Supreme Court of the District of Columbia.

The defendant in error brought his action in the court below to recover the sum of fifteen thousand dollars for personal injuries alleged to have been received by him on the 13th day of September, 1872, in the city of Washington, through the carelessness of the servants of the Baltimore and Potomac Railroad Company.

At the trial of the cause the plaintiff offered evidence to prove that he was a journeyman carpenter and resided in this city, on D street, between Ninth and Tenth streets southwest, and that on the morning of the day on which the accident occurred, he started from his dwelling-house about twenty minutes after six o'clock, to go to his work in the northern part of the city. From his door he saw a train of freight-cars standing still on Maryland avenue, extending from between Seventh and Eighth streets nearly to Tenth street, with an engine attached to the west end of the train. He passed up Ninth street, and when he reached the train he attempted to pass over or through it between

two of the cars. While endeavoring thus to pass through, the train, without any signal or warning, was suddenly shoved backward, and he was thrown in such a manner that his foot was caught between the bull-noses of the coupling apparatus. His foot was so badly injured as to render necessary the amputation of two toes, and he was confined to his house under medical treatment for several months. That he was permanently incapacitated by the injuries from pursuing his trade. That this train remained across Ninth street about twenty minutes after the injury. Maryland avenue had been dug up and left in that condition by the board of public works, and rain had fallen during the previous night, leaving the streets impassable on account of mud, except where crossings were provided. There were crossings at Ninth street and at Seventh street but none at Eighth street. To have gone around the train he would have been obliged to go to Seventh street, two blocks out of his way, or cross in the mud at Eighth.

The plaintiff also introduced evidence to prove that long prior to the time of the accident the defendant, with the knowledge of the plaintiff, had been constantly in the habit of obstructing Ninth street, at this point, with its trains with engines attached thereto, for as long as half an hour at a time, and that persons having occasion to cross the avenue there had theretofore been in the constant habit of passing under and over the defendant's cars in the presence of the employés of the company in charge of the trains, with their knowledge and without their protest. To the introduction of this evidence the counsel for the defendant interposed objections, but the court admitted the evidence. Upon the admission of this testimony the first exception is based.

The defendant introduced evidence to prove that at the time the plaintiff got upon the freight-train it was moving slowly forward, and had partly passed the intersection of Maryland avenue and Ninth street, and that the train stopped almost instantly after the plaintiff got upon it.

That the train was moving on an up-grade, and on stopping, the bull-noses were brought together by the law of gravitation. That the foot of the plaintiff could not have been caught between the bull-noses of the cars if the plaintiff had gotten upon the train after it had stopped, because the bull-noses were brought together when the train stopped, and so remained until it was drawn forward again. That on the morning when the accident occurred the defendant's agents were in the usual pursuit of the business of the company and had not delayed the public unusually or unnecessarily. That orders had been issued by the officers of the railroad company to prevent the unreasonable obstruction of the crossings and public ways, and that their orders were carried out, except in cases of accident. And that orders had also been given to prevent persons from passing across the trains while they were in motion, or while an engine was attached thereto, and that persons had been warned and prevented from passing over and under trains, and from getting on them while in motion. Evidence was also introduced to prove that after the plaintiff got upon the train, and prior to the injury, the engineer did not reverse his engine nor do anything to give the engine either a forward or backward movement.

Special acts of Congress and local laws and ordinances were introduced to show that the defendant had the right to use Maryland avenue and the depot situated on the corner of Ninth street and Maryland avenue for the purpose of carrying on its business, and that on the morning when the accident happened the agents of the company were in the usual pursuit of its business, and did not delay the public unreasonably or unnecessarily.

After the testimony was closed the defendant's counsel submitted a series of written prayers for instructions to the jury, all of which were granted by the court without objection. The first, second, and fourth of these prayers were based upon the evidence introduced by the defendant to show that at the time the plaintiff made his attempt to pass

through between the freight-cars the train was in motion. The third was in substance that if the jury should believe that the plaintiff, in attempting to cross the train, did not exercise proper care and prudence, and that his injuries were the result of his want of care, the plaintiff was not entitled to recover, although the train was blocking up the street along which he desired to pass. The fifth prayer instructed the jury that the defendant had a lawful right to use the public street at that point, in a reasonable manner, to shift its cars in the usual pursuit of its business, and that if the delay on the morning of the accident had not been unreasonable or unnecessary, the obstruction was not unlawful. By the sixth prayer the jury was instructed that if the orders to prevent persons from passing through trains were given by the company to its agents in charge of the trains, as the defendant by its evidence attempted to prove, and persons had been warned not to pass through the trains, but that other persons had previously passed through, that fact could not be taken as a license to the public to so pass through the trains at the point in question, nor absolve the plaintiff from his obligation to use ordinary care and prudence. The seventh prayer instructed the jury that if the plaintiff did not exercise ordinary care and prudence, the fact that other persons had before that time crossed the trains at that point under similar circumstances, without being stopped by the agents of the company, did not relieve the plaintiff from the obligation to use ordinary care and prudence, nor impose upon the defendant the duty of exercising more than ordinary care and prudence. It is not important to refer to the eighth prayer. The ninth informed the jury that if they should find that after the plaintiff jumped on the train, the agents of the defendant could not have prevented the injury by careful management of the train, no recovery could be had.

The court, at the request of plaintiff's counsel, notwithstanding objections interposed on the part of the defendant, then instructed the jury generally as follows:

"If the jury find from the testimony that the train of the defendant was lying across Ninth street on the morning of the accident, obstructing travel along Ninth street; that the plaintiff got on the train when it was standing still; that the injury to the plaintiff was occasioned by suddenly starting the train either backward or forward; that there was no notice given of the movement of the train, either by ringing a bell, blowing a whistle, or otherwise, and that theretofore the defendant had been in the habit of obstructing Ninth street; that footmen had theretofore been in the habit of passing under and over the cars in the presence of the employés of the defendant having charge of the train, with their acquiescence and without their protest; if you find these conclusions concurring, the defendant is liable; these facts concurring make it the duty of the defendant to give notice of some kind before moving."

Assignment of Errors.

1. The court erred in admitting testimony to show that the defendant had been in the habit of obstructing Maryland avenue with trains, and that persons had been in the habit of passing under and over the trains, with the knowledge and without the protest of the defendant's servants in charge of such trains.

2. The court erred in refusing to strike out and exclude from the consideration of the jury all the testimony mentioned in the foregoing assignment of error.

3. The court erred in granting the instructions asked for by the counsel for the plaintiff.

Argument and Authorities.

The first error committed by the learned judge who presided at the trial of the cause, consisted in submitting evidence to the jury to prove that the company had been in the constant habit of obstructing this street, and permitting persons, without objection or protest, to pass under or over the trains. This evidence formed a principal ingredient in the last charge to the jury given in obedience to the prayer of the plaintiff and found in the last exception. There was

not a word of proof to show that the plaintiff ever witnessed such proceedings, or that he had any knowledge of them, nor does it appear how this habit, if it did prevail, could have operated to the injury of the plaintiff on this occasion. It is entirely immaterial whether such a custom prevailed or not. As well might instances of such negligence occurring after the accident have been shown to the jury. Even if the plaintiff had been misled and thrown off his guard by the example of imprudence on the part of other people, he could not, by their want of common prudence, escape the responsibility of his own negligence. Neither the acquiescence, nor the express permission of the servants of the company, would have rendered the company liable for the consequences of so gross an act of negligence. The fact that the agents of the company had, on former occasions, been negligent, and had been in the "constant" habit of obstructing this street, was not a proper subject of inquiry, and the evidence on that subject was neither proper nor material in this case.—(Brennan vs. B. & O. R. R. Co., 24 Md., 108; C. B. & Q. R. R. Co. vs. Lee, 60 Ill., 501.) In the case of Hickey vs. Boston & Lowell R. R. Co., (14 Allen, 429,) the evidence showed that the passengers were in the habit of riding into the depot on the platform of one of the cars, and this was done by the express permission of the conductor and brakeman, and without objection from the superintendent and directors who knew of the practice. But the court held that this was such a degree of negligence as to preclude a right of recovery from the company for an injury received while occupying this exposed and dangerous position. The court says: "That the intestate and others were accustomed to take this mode of entering the station did not tend to show that it was safe or prudent for him to do so. Nor would the implied assent of the officers of the corporation, arising from knowledge and acquiescence, nor even the express consent and permission of the conductor of the train, change the relations between the parties and their several obligations. It

is not enough that Hickey was rightfully upon the platform. Because he might rightfully occupy whatever place the conductor would permit, it does not follow that he would do so at the risk, exclusively, of the corporation."

It would have been entirely immaterial here if the servants of the company had given the plaintiff permission to climb over or through the freight train. He could not, by that fact, justify the taking of such a risk, or thereby shift the responsibility upon the company. It is no part of an agent's duty to advise people upon such questions or to put hazardous risks upon their principals by granting permission to pass through freight-trains which are liable to start at any moment.

In the case of Jones against this company, in this court, (95 U. S., 439,) decided at the last term, there was evidence to show that the conductor of the train told the man, who was a laborer and entitled to ride, "to jump up anywhere; that they were in a hurry." And thereupon the man climbed up on the pilot of the engine, where he was seriously hurt. But the court said "the knowledge, assent, or direction of the company's agents as to what he did was immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter the former could not arise."

The court erred in admitting testimony of this character, and erred also in denying the motion of defendant's counsel to exclude it from the consideration of the jury.

The next exception arises upon the general prayer granted by the court upon the request of the plaintiff's counsel. This

general instruction submitted several propositions to the jury, all of which being resolved by them in the affirmative, they were told that a verdict for the plaintiff must follow. These propositions may be fairly stated in this way: Was the train at the time obstructing Ninth street, and was it standing still when the plaintiff got on it; was his injury occasioned by suddenly starting the train either backward or forward, and was any warning given of the movement of the train by ringing the bell or otherwise? Was the defendant in the habit of obstructing Ninth street, and had footmen been in the habit of passing under and over the cars in the presence of employés of the defendant, with their acquiescence and without protest? If the jury answered these inquiries, thus propounded, in the affirmative, the verdict against the defendant must be the result.

The court distinctly laid down the doctrine to the jury that if the agents of the company, prior to the accident, had been in the habit of obstructing the street at this place with the trains, and that footmen had been in the habit of passing over and under the cars there, in the presence of those agents, with their acquiescence and without protest, and that when the plaintiff in passing down Ninth street found it blocked up by this stationary train, with a locomotive attached, ready to move, he had a lawful right to climb upon the train and to pass through between two of the box-cars in the train. Having so gotten on the train, that the defendant could not lawfully move the train without first giving notice of some kind to him. The court plainly told the jury that if under these circumstances the defendant started its train without giving notice to the plaintiff of the intention to move, by blowing a whistle, ringing a bell, or otherwise, the company was absolutely liable for any injury inflicted upon the plaintiff while attempting to pass through, without reference to any negligence on the part of the plaintiff. There is no limitation in the charge; the propositions comprise a complete theory, covering the entire ground, and leave no channel for

escape to the company should the jury determine that the existence of those concurring conditions was established by the proof. In other words, the court declared that by these attending circumstances the company gave the plaintiff a license to pass through the train, and insured him against injury from any movement of the train, while he should be engaged in his rash attempt.

A portion of this instruction is in conflict with the third and seventh prayers previously granted to the defendant, and overrules them. To grant to the parties instructions which are inconsistent is error.—(B. & O. R. R. vs. Blocker, 27 Md., 277.)

None of the prayers granted on the request of the defendant's counsel related to the omission or duty to sound an alarm before moving the train. No one of them can be said to limit the responsibility of the defendant by enforcing upon the jury considerations of the rash and imprudent acts of the plaintiff in connection with the absence of a warning bell or whistle.

The element in this charge to the jury in regard to the previous custom of blocking up the street and permitting footmen to pass under and over the cars, has already been fully discussed.

It is difficult to conceive of a more glaring act of rashness than that of which the plaintiff in this case was guilty. In the case of Jones vs. B. & P. R. R. Co., before cited, the plaintiff undertook to ride a short distance on the bumper of the locomotive, and this court held that such an act was so grossly negligent as to prohibit him from recovering damages. But in this case the recklessness was far greater; the plaintiff, rather than walk the distance of one block and cross the street where there was no foot-way, endeavored to force himself through between two of the box-cars constituting a freight-train, to which an engine was attached and liable to move at any moment. It is peculiarly dangerous to pass through a freight-train ready to move; a person making such an attempt must necessarily

stand in imminent peril; there is no platform on the freight-cars on which to gain a foot-hold as on passenger-cars, and no facilities to enable the person to guard himself against accident. He is necessarily concealed from the view of the engineer and the other agents of the company, who must ordinarily be ignorant of the position, and unsuspicious of the presence, of such reckless intruders. Notwithstanding these obvious considerations, the court below instructed the jury in behalf of the plaintiff, as if he were not under the slightest obligation to exercise any degree of care or prudence whatever; as if he were justified in this extremely hazardous attempt because the company had obstructed for a few minutes his passage along Ninth street.

There was no evidence offered by the plaintiff to show how long the train had been standing there before the accident happened, and the evidence of the defendant was to the effect that at the time the plaintiff climbed upon it, the train was moving. Nor was there any evidence to show that the plaintiff had ever before seen the defendant's trains obstructing the street at this point, or that the fact that the agents of the defendant were in the habit of blocking up this street had ever been brought to the knowledge of the plaintiff.

The court below appears to have been of the opinion that the acts of negligence on this occasion to be charged to the defendant consisted in the fact of obstructing the street, permitting people to pass through the train at other times, and in omitting to ring a bell, sound a whistle, or give some other signal before starting the train.

It does not anywhere appear how the plaintiff, in his precarious position, could have been protected or benefited by the sounding of the bell or whistle, or that his injury was in any way chargeable to the fact that no signal was given to indicate that the train was about to move.

In the case of C. B. & Q. R. R. Co. vs. Lee (60 Ill., 501) the court, whose judgment was under review, had instructed the jury much more guardedly as to the consequences of

omitting to ring the bell of the locomotive, as required by statute, than was done in this case. The Supreme Court of Illinois, in reversing the judgment, said:

"The first above instruction is erroneous in that it makes the company liable for Lee's death upon failure to sound the whistle or ring the bell, without reference to whether the omission to do so was the cause of or conduced to his death or not. If the bell was not rung or whistle sounded the plaintiff can recover, the instruction says, provided the deceased was not guilty of greater negligence, without saying whether the omission was found to have had any effect in causing his death or not. The acts might have been performed and the deceased not have heard the signal or heeded it; or he might, notwithstanding, have ventured to attempt to cross the track in advance of the approaching train, in mistaken reliance upon his ability to do so before it would reach the crossing. It is not to be asserted as a matter of law, that by reason of the neglect to ring the bell or sound the whistle the injury was produced."

Even where by statute it is made the duty of railroad companies to give warning by blowing a whistle or ringing a bell, the omission to comply with the requirement does not make the company absolutely liable for an injury to persons at the point where the signal should have been given, but only when the injury was caused without the contributory negligence of the person injured. When the injury was caused solely by reason of the omission, the company is liable, but it is not if the negligence of the injured person contributed to produce the injury.—(Artz vs. Chi. R. I. & B. R. R. Co., 34 Iowa, 153; Reynolds vs. Hindman, 32 Iowa, 146; Steves vs. O. & S. R. R. Co., 18 N. Y., 422; Wilcox vs. Rome, W. & O. R. R. Co., 39 N. Y., 358.)

In view of the decisive importance given by the court to the omission to sound a warning that the train was about to move, it may seem remarkable, yet it is nevertheless true, that there is no statute of force in the District of Columbia requiring this railroad company to ring a bell, sound a whistle, or otherwise give notice or warning of any movement of its trains, in the city of Washington, either at a

crossing or elsewhere, except of the *approach* of trains. The only statute on this subject affecting this company is an act of the legislative assembly of the District of Columbia, and this act requires neither the ringing of bells nor the blowing of steam-whistles. It prescribes a very different kind of precaution, and leaves an unmistakable inference that bells and steam-whistles are not to be sounded. The act of the legislative assembly of the District of Columbia, approved August 23, 1871, requires this and other railroad companies to give "warning of the *approach* of the locomotive engines and railroad cars," and to accomplish this the companies are directed "to keep in the daytime, at every point where any public street crosses the railroad track of said companies, a person stationed with a red flag, and in the evening, until the arrival and departure of the last train at night, at all the street-crossings, a person with a flag and lighted lamp or lantern with red glass."—(Laws of 1st Sess., 105.) It will be observed that this statute requires a warning of the "approach" of the locomotives and trains. Nothing is said about warning the public of the intention to start a train, either backward or forward.

The injured person in this case was not a passenger, and, therefore, the company was not bound to use any greater care than prudent people ordinarily observe in the use of their own property. The company was rightfully in the street, and had the right to use it for the purpose of conducting its business, as prescribed by the charter. It was not bound by statute to ring a bell or sound a whistle to indicate when the train was about to move, and whether it was negligence to omit such a warning could not be more than a question of fact for the jury. The charge of the court took that question away from the jury and decided it as one of law exclusively. This was wrong; the question as to whether or not it was negligence to omit to ring the bell or blow the whistle before moving, was a question of fact, and should have been submitted to the jury.—(Galena & Chi. U. R. R. Co. vs. Dill., 22 Ill., 264; Havens vs. Erie

R. R. Co., 41 N. Y., 296; Eaton vs. Erie R. R. Co., 51 N. Y., 544.)

Even if the servants of the company were guilty of negligence at the time of the accident, the extraordinary temerity of the plaintiff was the proximate cause of the accident and, therefore, he is precluded by law from recovering against the corporation. Without his concurring act of carelessness the accident could not have happened. The court in the recent case of Jones vs. R. R. Co., before cited, has laid down the rule of law, on the subject of contributory negligence, in the following language:

"One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: 1. Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened."

By this instruction the jury was not invited to consider whether or not the plaintiff, by his reckless efforts to cross the train, had contributed to or primarily caused his own injury; the court seems to have proceeded upon the assumption that it was not imprudent or reckless to attempt to pass through this freight-train, with an engine attached liable to move at any moment, because the train was then obstructing the street, and because the street had been so obstructed on previous occasions. The question of the negligence of the plaintiff was excluded entirely by this instruction.

The degree of negligence, as shown by plaintiff's own evidence, was so extraordinary that it was resolved into a question of law as to whether or not the defendant

was liable; if the court had been requested by counsel to direct a verdict for the company it would have been bound to grant the request. After diligent search in the books I have been able to find but two cases where the plaintiff, being an adult, attempted to pass through a freight-train with an engine attached and liable to start suddenly. In both of these cases the court decided, as matter of law, that such an act was so grossly negligent as to preclude a recovery. One of these cases is Lewis vs. B. & O. R. R. Co., (38 Md., 588,) and the other is C. B. & Q. R. R. vs. Dewey (26 Ill., 255).

In the latter of these cases a freight-train, in the night-time, was standing on a side-track between the ticket-office and a passenger-train, waiting for the passenger-train to depart, and the person injured, wishing to get on board the passenger-train, undertook to pass through or under the freight-train; the engineer of the engine attached to the freight-train desiring to procure wood, started his engine at the unfortunate moment and the man was fatally injured. The court held that the company was not liable. In summing up the case the court says:

"The deceased knew that an engine was attached, with steam up, liable to move at any moment. It was in the night, when the engineer or conductor would not be liable to see or know of his effort to pass between the cars. He gave no notice of his intention to pass through, and these officers had a right to suppose a prudent or reasonable person would not attempt to pass at the time and under the circumstances. And the evidence seems to show that the bell was rung, and the usual notice thus given, before the train was moved. We are, from all these facts, of the opinion that the deceased was guilty of gross negligence in attempting to pass between the cars when in motion, or when on the point of moving. There can barely be a doubt but that any reasonable, prudent, and careful person would have gone around the train, or would have waited until it passed. His conduct, we think, contributed more largely to his death than the negligence of the company. Had he used ordinary prudence, the occurrence would not have

taken place. And whilst the company were guilty of such negligence as would have rendered them liable for injury to a child, or a person of less than ordinary mind, yet the deceased being an adult, must be presumed to be endowed with sufficient reason to enable him to exercise ordinary prudence. Having failed to do so, the company cannot be held liable for the injury."

The degree of carelessness of the injured person in the case of Lewis vs. B. & O. R. R. Co., was not greater than in the case under argument.

In the case of Dixon vs. Central R. R. Co., (42 Ga., 327,) the plaintiff encountered a passenger-train blocking up the street along which he desired to pass and he crawled under it; the train was suddenly started and he was injured. The court held that the company was not liable.

It is submitted that the judgment of the Supreme Court of the District of Columbia should be reversed.

ENOCH TOTTEN,
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BALTIMORE & POTOMAC RAILROAD CO.,
Plaintiff in Error,

vs.

JAMES H. GRANT, Defendant in Error.

Supplemental Brief for Plaintiff in Error as to the Appellate Jurisdiction of the Court.

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Supplemental Brief for Plaintiff in Error as to the Appellate Jurisdiction of the Court.

When the writ of error was sued out in this cause, December 6, 1875, the statute in force regulating appeals, &c., to this court from the Supreme Court of the District of Columbia, were included in the sections of the Revised Statutes, relating to this district, numbered eight hundred and forty-six and eight hundred and forty-seven, which provisions are in the words and figures following, to wit:

"SEC. 846. Any final judgment, order, or decree of the Supreme Court of the District may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and

in like manner as provided by law in reference to the final judgments, orders, and decrees of the circuit courts of the United States.

"SEC. 847. No cause shall be removed from the Supreme Court of the District to the Supreme Court of the United States, by appeal or writ of error, unless the matter in dispute in such cause shall be of the value of one thousand dollars or upward, exclusive of costs, except in the cases provided for in the following section."

After this writ of error had been pending here over three years, a law was enacted by the legislative authority entitled "An act to create an additional justice of the Supreme Court of the District of Columbia, and for the better administration of justice in said district," which was approved February 25, 1879. The fourth section of this statute contains the provision which has provoked this motion to dismiss, and it is as follows:

"SEC. 4. The final judgment or decree of the Supreme Court of the District of Columbia in any case where the matter in dispute, exclusive of costs, exceeds the value of twenty-five hundred dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same manner and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in a circuit court."

The fifth section of the act provides that "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

If this late statute had deprived this court of its appellate jurisdiction in cases where the amount involved did not exceed the sum specified, or in other words, if it had expressly prohibited this court from reviewing judgments or

decrees within the limited amount, then no doubt could have existed on the question of jurisdiction. But this was not done. No allusion whatsoever to the old regulation is found in the new statute. Counsel, in their brief in behalf of this motion, now cite several cases, but each of those cases seems to rest upon some peculiar statutory provision, and is plainly distinguishable from this case.

The case of the Insurance Company vs. Ritchie (5 Wall., 541) is not applicable, because the repealing statute in that case expressly prohibited and took away the entire appellate jurisdiction. The same observation may be made as to the case of McCardle (7 Wall., 506). The statute in that case was purely a partisan enactment, and it provided that this court should not possess or exercise *any* appellate jurisdiction in cases of the character mentioned, where appeals "*have been* or may hereafter be taken." The act was notoriously aimed at the McCardle case.

In the case of Norris vs. Crocker (13 How., 429), the question related to an action to recover an arbitrary and severe penalty, imposed by law for the benefit of the owners of fugitive slaves, for aiding the slaves to escape from such owners, and the statute creating the penalty being repealed, the penalty, of course, fell with it. The court, in deciding that case, declared that inasmuch "as the plaintiff had no *vested right* in the penalty, the legislature might discharge the defendant by repealing the law. In this case the appellant has a deep interest, if not a vested right, in having its writ of error considered and passed upon. To sue out and perfect a writ of error to this court is attended with very considerable expense.

The sole question involved in this motion seems to be whether the legislature intended by this statute to strike

down all appeals and writs of error then pending in this court in causes involving less than the value prescribed, or only to establish a new regulation applicable to future cases. If the former consequence was intended, that intention must be derived solely through implication, because there is not a word in the recent statute referring to the former. It will not be overlooked that the right of appeal is not taken away; it is only limited. All causes on the docket of this court at the date of the passage of the act in question were here by virtue of the old statute, and they are still here by the same authority. When the amount involved is twenty-five hundred dollars or upwards, there can be no doubt about the jurisdiction of this court. Does the last statute repeal the former absolutely, so as to deprive the court of its power to entertain the appeal? If it does, that result is brought about by implication only. Now, repeals by implication are not favored by courts of justice, and there is nothing in these two acts necessarily inconsistent, if one is applied to pending and the other to future appeals.

One statute is not to be construed as a repeal of another, if it be possible to reconcile the two together.—(McCool vs. Smith, 1 Black, 459; Harford vs. U. S., 8 Cranch, 109; Sedg. on Stat. & Con. Law, 127; 4 G. & J., 1; Bowen vs. Lease, 5 Hill, 221; Wood vs. U. S., 16 Peters, 342.)

In the McCardle case the *whole appellate jurisdiction* was taken away in very positive and unmistakable language. In the case of Norris vs. Crocker the very statute creating the penalty was expressly repealed. If this statute had said that this court should have no appellate power over the judgments of the Supreme Court of the District of Columbia, the McCardle case would have governed the question here. But the law does not propose to interfere with pend-

ing causes or take away the appellate jurisdiction of this court. It seems fair to conclude that if Congress had intended to interfere with the rights and remedies of parties to causes then pending in this court, and to operate retrospectively, apt words to convey that intention would have been employed.

Statutes will not be held to operate retrospectively unless it is necessary, and, as shown before, it is wholly unnecessary here.

It is a rule of construction that all statutes are to be considered as operating prospectively unless the language is express to the contrary, or there is a necessary implication to that effect.—(Harvey vs. Tyler, 2 Wall., 347; United States vs. Heth, 3 Cranch, 399; Prince vs. United States, 2 Gall., 204.)

It was a well-known fact, in, as well as out of Congress, that the Supreme Court of the District of Columbia was not capable of properly disposing of the business which came before it. This act was intended to remedy that evil. By virtue of its provisions and by the resignation of one of the judges of that court before the passage of the act, two judges were added to the working force of the court, thus enabling it to give more mature deliberation to the cases by it decided. This justified an enlargement of the limit of appeals from that court as thus reorganized. The reason of the change in the amount can have no application to causes determined prior to such reorganization. The intention of the legislature, therefore, could not have been to interfere with the appellate jurisdiction in cases already pending here. The new regulation was intended to apply only to the Supreme Court of this District as reorganized.

A comparison of the language of this act with the language of section eight hundred and forty-seven, above cited, gives strength to this argument. The language of that section is emphatic and exclusive: "*No cause shall be removed* from the Supreme Court of the District of Columbia to the Supreme Court of the United States, by appeal or writ of error, *unless*," &c., &c. In the new statute the milder and more flexible expression, "may be re-examined," &c., &c., is employed.

It is, therefore, submitted that this motion to dismiss for want of jurisdiction ought to be denied.

ENOCH TOTTEN,
For Plff. in Error.

In the Supreme Court of the United States.

No. 196.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES H. GRANT.

In error to the Supreme Court of the District of Columbia.

BRIEF ON MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR.

The defendant in error filed a motion to dismiss the writ of error in this cause, for the reason that the power of reviewing the case has been taken away by a recent act of Congress, entitled "An act to create an additional associate justice of the Supreme Court of the District of Columbia, and for the better administration of justice in said District," approved February 25th, 1879.

The writ of error was sued out to the supreme court of the District of Columbia. The suit was instituted to recover damages for personal injuries alleged to have been sustained by the plantiff through the carelessness and negligence of the railroad company and its employés; and judgment was rendered in his favor to the amount of $2,250. This sum is, of course, under repeated adjudications of this Court, the amount in controversy, which determines the right of appeal.

Gordon *vs.* Ogden, 3 Peters, 33.
Smith *vs.* Honey, 3 Peters, 469.
Knapp *vs.* Banks, 2 Howard, 73.
Walker *vs.* United States, 4 Wallace, 168.

Prior to the act of February 25, 1879, the limit of appeal from the supreme court of the District of Columbia to this Court, was the sum of $1,000. (Revised Statutes of the United States for the District of Columbia, sections 846, 847.)

The recent act, by its fourth section provides, that "the "final judgment or decree of the supreme court of the Dis- "trict of Columbia in any case where the matter in dispute "exclusive of costs, exceeds the value of twenty-five hun- "dred dollars, may be re-examined and reversed or affirmed "in the Supreme Court of the United States, upon writ of "error or appeal, in the same manner and under the same "regulations as are provided in cases of writs of error on "judgments, or appeals from decrees rendered in a circuit "court."

And in the fifth section, it is provided, that "all acts or "parts of acts inconsistent with the provisions of this act "are hereby repealed."

The act of February 25, 1879, operates not only to prevent the re-examination in this Court of all suits to be brought here in future from the supreme court of this District of Columbia upon writ of error or appeal, where the amount in controversy is less than $2,500, but also to require the dismissal of all appeals and writs of error now pending where the amount involved falls below that sum.

Section 847, of the Revised Statutes for the District of Columbia is plainly inconsistent with the provisions of the recent act, and is therefore repealed. And "when an act "of the legislature is repealed, it must be considered, ex- "cept as to transactions past and closed, as if it never "existed. And the effect of repealing acts upon suits under "acts repealed, has been determined by the adjudications "of this Court. The subject was fully considered in Norris "*vs.* Crocker (13 Howard, 429,) and more recently in Insur- "ance Company *vs.* Ritchie (5 Wallace, 541.) In both of

"these cases it was held that no judgment could be rendered "in a suit after the repeal of the act under which it was "brought and prosecuted. It is quite clear, therefore, that "this court cannot proceed to pronounce judgment in this "case, for it has no longer jurisdiction of the appeal."

Ex parte McArdle, 7 Wallace, 506, 514.
McNulty *vs.* Batty, 10 Howard, 72.
Norris *vs.* Crocker, 13 Howard, 429.
Insurance Co., *vs.* Ritchie, 5 Wallace, 541.
Steward *vs.* Kahn, 11 Wallace, 502.

Moreover, "the principle that the affirmation of appellate "jurisdiction implies the negation of all such jurisdiction "not affirmed, is established."

Ex parte McArdle, 7 Wallace, 513.

In the McArdle case, the repealing act was passed, not only after the appeal was taken, but after the case had been argued here and submitted to the Court. Upon re-argument, for the reasons cited, the Court decided that it had no longer any jurisdiction in the case, and accordingly dismissed the appeal.

It does not seem that, in this respect, the McArdle case differs from the present; and we, therefore, submit that the writ of error in this case should be dismissed.

R. T. MERRICK,
WM. F. MATTINGLY,
For Defendant in Error.

Supreme Court United States.

OCTOBER TERM, 1878.

No. 196.

BALTIMORE & POTOMAC R. R. CO.,

PLAINTIFF IN ERROR.

vs.

JAMES H. GRANT.

Brief of Defendant in Error.

The facts in this case, as they appear from the record, in proof on behalf of the defendant in error, are simply these: James H. Grant, the plaintiff below, was a journeyman carpenter by trade, living on D street, between 9th and 10th streets southwest in this city. On the morning of the 13th September, 1872, he started from his house at 6:20 o'clock A. M. to go to his work in the northern part of the city, seeing from his door defendant's train of freight cars lying along Maryland avenue. On coming up Ninth street, his proper route, the train extended from between Seventh and Eighth streets nearly to Tenth street; it was standing still with an engine attached at the west end of the train. At the crossing on Ninth street he attempted to pass over the train between two of the cars, when the train *without any signal*

or warning of any kind, suddenly shoved back throwing him so that his foot was caught between the couplings of the cars and was badly crushed. Two of his toes were amputated; he was under medical treatment for several months and was permanently disabled from pursuing his trade as formerly.

Maryland avenue had been dug up by the Board of Public Works; it had rained the night before and was impassable except at those streets where there were crossings. There were crossings at Ninth street and Seventh street, but none at Eighth street. To have gone around the train he would have had to go to Seventh street, two squares out of his way.

Long prior to this time the defendant, with the knowledge of the plaintiff, had been constantly in the habit of obstructing Ninth street with its trains, with the engines attached, for as long as half an hour at a time; and persons having occasion to cross Maryland avenue at Ninth street were in the constant habit of passing under and over defendant's cars in the presence of defendant's employees in charge of the trains, with their knowledge and without their protest.

On the morning of the accident to the plaintiff the train remained standing across Ninth street for twenty minutes after he had been injured.

The court below instructed the jury that if they found these to be the facts of the case then it was the duty of the defendant to give notice of some kind before moving the train; and if the sudden starting of the train occasioned the injury to the plaintiff the defendant was liable.

The plaintiff's right to recover is not affected by his having contributed to his injury, unless he was in fault in so doing. If the defendant has by his own act thrown

the plaintiff off his guard, and given him good reason to believe that vigilance was not needed, the lack of such vigilance on the part of the plaintiff is no bar to his claim. Ser. & Red. on neg., sec. 28.

The Railroad Company was acting in violation of law in obstructing Ninth street with its freight train. See act of Leg. Ass. D. C., 1st sess., p. 106, sec. 3.

The Company was in the constant habit of blocking up Ninth street with its trains, and persons who had occasion to travel up and down that street were in the constant habit of passing over and under the cars with the full knowledge of the Company's agents. The plaintiff below simply did, at the time he received the injury, what he saw others doing daily with the permission of the Company.

Under such circumstances he can't be charged with contributory negligence.

Nor, we submit, can a railroad company, daily obstructing a street crossing, permitting its train to be made a foot-path of by passengers along the public street, suddenly, without warning or notice of any kind, start its train in motion, converting it into an instrument of slaughter, without being held liable for injuries to persons thus inflicted.

The degree of care and prudence required to be exercised by the plaintiff was at the defendant's request left to the jury. (See its 3d, 4th and 7th prayers.)

50 Mo., 461—*Brown* vs. *H. & St. Jo. R. R. Co.*
(S. C. 11 Am. Rep., 420.)

In this case a train obstructed the crossing. Plaintiff attempted to cross at another place where there was no public crossing, and was injured; defendant held liable in absence of ordinary care on its part.

58 N. Y., 56, *Sprong* vs. *B. & A. R. R. Co.*

Evidence of custom for brakemen to ride upon